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No. 292

In the Supreme Court of the United States

OCTOBER TERM, 1968

UNITED MINE WORKERS OF AMERICA, DISTRICT 30, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 23a–29a) adjudging petitioners in contempt of its earlier decree is reported at 393 F. 2d 265. The report of the special master (Pet. 1a–22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1968 (Pet. 30a–34a). The petition for a writ of certiorari was filed on July 15, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals applied the proper standard of review in affirming the special master's findings of fact.

2. Whether, in a contempt proceeding involving a decree enforcing an order of the National Labor Relations Board, Section 2(13) of the National Labor Relations Act provides the applicable evidentiary standard for determining a union's responsibility for the acts of its officers and members.

3. Whether the civil contempt adjudication was otherwise proper.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and the Norris-LaGuardia Act (29 U.S.C. 101, *et seq.*), are set forth in the petition at pp. 47a–51a.

STATEMENT

On May 20, 1960, the court of appeals, pursuant to a settlement stipulation, entered a decree (Pet. 35a) enforcing in full an order of the Board. The court's decree provided that petitioner labor organizations and their officers and agents (Pet. 35a):

> 1. Shall not:
>
> * * * * *
>
> B. Restrain and coerce employees * * * of any * * * employer engaged in coal mining operations * * * within the geographical limits of the territorial jurisdiction of District 30, United Mine Workers of America * * * in the exercise

of their rights guaranteed them by Section 7 of the Act, by engaging in and/or participating in conduct more fully described below:

(a) Exerting force or committing acts of force and violence against said employees, injuring the person or damaging the property of said employees, threatening said employees by following them in superior numbers, using or threatening to use force or violence against said employees, assaulting employees, attempting to assault employees, threatening them with reprisals, barring their ingress to and egress from their places of employment, preventing them physically from working or in any other manner restraining or coercing them in the exercise of [their rights guaranteed by Section 7 of the Act].

On July 8, 1966, the Board filed a petition with the court of appeals, requesting that petitioner labor organizations and certain of their officers and agents be adjudged in civil contempt for disobeying the prior decree. The relevant facts establishing the contempt are set forth in detail in the report of the special master appointed by the court of appeals (United States District Judge Neese), which is set forth as an appendix to the petition (Pet. 1a–22a).

In general, the alleged contempt related to attempts by the petitioners to coerce and intimidate employees of Terry Elkorn Mining Company, Inc., Mahan Coal Company and Harry Wright Construction Company, Inc., during the course of an organizational campaign. Typical of many instances of coercion and intimidation was that which occurred on March 31, 1966, at one of Elkorn's premises when

one of the union pickets, who had accompanied petitioner Hobbs to the site, stated that Elkorn "would be organized even if it took bloodshed" (SMR 10, Tr. 376).[1] That this was no empty threat of the Union became clear from events that followed. On April 8 at one of Elkorn's plants, petitioner Castle was one of a group of pickets who threw stones at a Wright Construction Company truck (SMR 15, Tr. 154, 168). A similar rock-throwing incident on April 11th resulted in two people in a truck being injured by shattered glass; one of these men required surgery to remove glass particles from his eye (SMR 16, Tr. 401). On April 19th when a truck driver was struck by rocks and knocked to the ground, a picket, holding a union membership card, approached him saying, "Now, God damn you, will you sign one now" (SMR 18; Tr. 160–161). On another occasion pickets dragged a truck driver from his truck, hit him over the head with a 10-inch pipe and battered the truck with a sledge hammer and a tire tool, smashing the windshield and knocking a hole in the door (SMR 16–17; Tr. 188–189, 193–194, 284–285). On May 20 Elkorn's employees found that a coal crusher and some other equipment had been damaged by an explosion and fire. A week later a second explosion did substantial damage to the crusher (SMR 23; Tr. 264–276). In addition, on several occasions throughout the period from March 31st to the middle of May the Union employed mass picketing tactics, at one time having as many as 400 pickets at a single site

[1] "SMR" refers to the special master's report and "Tr." to the transcript of testimony before the special master.

(SMR 14; Tr. 156; see also Tr. 49–51, 152–154, 217–218, 222, 544–552).

After hearing extensive testimony, the special master concluded that petitioners United Mine Workers and its District 30 local comprised a single legal entity; that petitioners Beane, Castle, Davis and Hobbs were agents of the Union; and that they had actual notice of the earlier decree (Pet. 19a, 4a). He further concluded that there was "clear and convincing evidence" (Pet. 16a) that petitioners had violated the prior decree of the court of appeals by (Pet. 15a):

> * * * committing acts of violence upon, physically assaulting and threatening with violence employees of Elkhorn, the Wright Company and Mr. Mahan; causing physical injury to some of the said employees; inflicting considerable damage to properties of the aforenamed employers; following the said employees in superior numbers; attempting to bar and barring the ingress to and egress from such employees' places of employment; attempting to and physically preventing such employees' working; and, by restraining and coercing such employees in the exercise of rights guaranteed them by 29 U.S.C. § 157.

The court of appeals, with minor modifications, approved the special master's report, holding that his "findings of fact are supported by substantial evidence on the record considered as a whole" (Pet. 26a). Accordingly, the court ruled that petitioners had committed civil contempt and issued an order requiring

them to purge themselves and providing for fines and other penalties if they failed to do so (Pet. 27a, 30a–34a).

ARGUMENT

1. Contrary to petitioners' contention (Pet. 23–24) the court below applied the correct standard of review in affirming the special master's findings of fact. The burden is on the Board in civil contempt proceedings to prove the alleged contumacious conduct by presenting "clear and convincing evidence" to the trier of fact. See *Kansas City Power & Light Co.* v. *National Labor Relations Board*, 137 F. 2d 77, 79 (C.A. 8); *National Labor Relations Board* v. *Local 5881, United Mine Workers of America*, 323 F. 2d 853, 854 (C.A. 6). Here, the special master found that the Board had satisfied that test (Pet. 16a–17a). Although petitioners contend that the court below should have applied the same standard in reviewing the special master's findings of fact, it is well settled that the findings of the special master are to be accepted if "supported by substantial evidence and are not clearly erroneous." *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 689; accord, *Olson Rug Company* v. *National Labor Relations Board*, 304 F. 2d 710, 712 (C.A. 7); *National Labor Relations Board* v. *Spartanburg Sportswear Company*, 278 F. 2d 312, 313 (C.A. 4); Rule 53(e)(2) of the Federal Rules of Civil Procedure. The court below properly applied that standard here (Pet. 26a).

2. Petitioners also err in contending (Pet. 26–30) that Section 6 of the Norris-LaGuardia Act (29 U.S.C. 106; Pet. 47a), rather than Section 2(13) of

the National Labor Relations Act,[2] provides the applicable evidentiary standard for establishing the liability of a union and its officers for the actions of other individuals. As this Court noted in *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 736, Congress, in enacting Section 2(13) as part of the 1947 amendments to the Labor Act, expressly provided that "the responsibility of a union for the acts of its members and officers is to be measured by reference to ordinary doctrines of agency, rather than the more stringent standards of § 6" (footnote omitted). Accord: *Madden* v. *Grain Elevator, Flour and Feed Mill Workers, ILA, Local 418,* 334 F. 2d 1014, 1021 (C.A. 7), certiorari denied, 379 U.S. 967; *International Ladies' Garment Workers' Union* v. *National Labor Relations Board,* 237 F. 2d 545, 551 (C.A.D.C.); *United Mine Workers of America* v. *Patton,* 211 F. 2d 742, 748 (C.A. 4).[3] This unanimous view of the courts is fully supported by the legislative history. See H. Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess., 36; 1 Leg. Hist. of the LMRA 540.

Petitioners cannot avoid the import of these cases and the legislative history on the ground that a Board contempt proceeding does not arise under the Labor

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[2] Section 2(13) provides that:

> In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

[3] *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, relied on by petitioners (Pet. 27), was decided prior to the 1947 amendments to the Labor Act.

Act. As this Court emphasized in *National Labor Relations Board* v. *Warren Co.*, 350 U.S. 107, 112–113:

> [The Labor] Act contemplates cooperation between the Board and the Courts of Appeals both at the enforcement and the contempt stages in order to effectuate its purposes. * * * The decree, like the order it enforces, is aimed at the prevention of unfair labor practices, an objective of the Act, and so long as compliance is not forthcoming that objective is frustrated. It is for this reason that Congress gave the judicial remedy of contempt as the ultimate sanction to secure compliance with Board orders. The granting or withholding of such remedial action is not wholly discretionary with the court. [Footnotes omitted.][4]

3. Petitioners also contend (Pet. 30–35) that contempt proceedings were inappropriate because the acts of violence and coercion occurring in 1966 were unrelated to the conduct which led to the 1960 decree. The special master found, however, that the conduct of the union did violate the 1960 decree and this finding was sustained by the court below (Pet. 20a–21a). Accordingly, this contention presents merely an evidentiary issue, which does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491; *Gravet Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275. In any event, the 1960 decree (Pet. 35a) prohibited the union and its officers

[4] Accord, *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 445–446; *National Labor Relations Board* v. *Hopwood Retinning Co.*, 104 F. 2d 302, 305 (C.A. 2); see also, *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 269.

and agents from engaging in the exact conduct that they were found to have resumed in the instant proceeding.[5] *Tosh* v. *West Kentucky Coal Co.*, 252 Fed. 44 (C.A. 6), is not in conflict. There, the contempt proceedings were dismissed because "[t]here was no evidence on the trial that the defendants in the [prior] injunction suit had anything to do with [the conduct upon which the contempt proceedings are based] * * * or that [the alleged contemnors] had at any time any actual relations with the real defendants in the injunction suit." *Id.*, at 50. Equally inapplicable is *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 196 F. 2d 755 (C.A. 1), where the court declined to entertain contempt proceedings "in view of the fact that the Board has already instituted and completed a new unfair labor practice proceeding" involving the identical conduct by the Company. *Id.*, at 760.[6]

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[5] It is irrelevant that Elkhorn did not begin its business until after the 1960 decree issued, and that neither Elkhorn nor the other employers affected by the Union's 1966 activity had filed the original charges in 1960 (Pet. 31). The 1960 decree barred the Union from restraining the employees of any employer engaged in coal mining and related operations within the territorial jurisdiction of District 30. Elkhorn, Mahan, and Wright were in this category.

[6] As petitioners correctly point out, certain aspects of their 1966 conduct led to an unfair labor practice proceeding based on charges that the Union had engaged in recognitional picketing in violation of Section 8(b)(7)(C) of the Act. (The Board's Decision and Order in that proceeding (163 NLRB No. 81) is now before the court below for enforcement. *National Labor Relations Board* v. *District 30, et al.*, No. 18383 (C.A. 6)). However, the 1966 activity also involved restraint and coercion in violation of Section 8(b)(1)(A), which was the subject of the

4. Petitioners contend that, even if the picketing and acts of violence were contemptuous of the court's decree, the court could not adjudge them in contempt because those acts had ceased before the Board had filed its petition with the court (Pet. 35–37). While a cessation of contumacious conduct may be a factor which might mitigate the sanctions to be imposed, the remedy of contempt would be substantially impaired if respondents could so easily avoid the impact of a remedial decree. See *National Labor Relations Board* v. *Mooney Aircraft, Inc.*, 61 LRRM 2163, 2164 (C.A. 5), January 17, 1966; cf. *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U.S. 563, 567–568; *National Labor Relations Board* v. *Pool Mfg. Co.*, 339 U.S. 577, 581–582.[7]

1960 decree. In such circumstances, it was proper for the Board to pursue both contempt and unfair labor practice proceedings. See *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 194–195; *Thompson Products* v. *National Labor Relations Board*, 138 F. 2d 637 (C.A. 6).

[7] *United States* v. *United Mine Workers of America*, 190 F. 2d 865 (C.A.D.C.), which turns on its special facts, is distinguishable. There, the restraining order directed the union to cease its strike and to instruct its members to return to work. When the strike and refusal to work continued, contempt proceedings were initiated. While the contempt proceedings were pending, the labor dispute was settled, the employees returned to work, and the national emergency came to an end; accordingly the court concluded there was no longer any necessity for civil contempt sanctions. *Id.*, at 872. In contrast, here, although petitioners were ordered to cease and desist from their illegal conduct and did for several years, they thereafter resumed the same type of conduct. Moreover, although they again ceased the activity when contempt proceedings became imminent, there was no showing that the underlying labor dispute had been resolved.

5. Petitioners also contend (Pet. 38–40) that the imposition of conditional fines and the setting of terms of imprisonment to be imposed for future violations of the order is inconsistent with the remedial nature of civil contempt proceedings. Since these fines and penalties are only to be imposed in the event that petitioners should fail to purge themselves as directed (Pet. 33a), they constituted appropriate sanctions in civil contempt proceedings. See *Penfield Co.* v. *Securities & Exchange Commission,* 330 U.S. 585, 590–591; *Shillitani* v. *United States,* 384 U.S. 364, 368–372.[8]

In such circumstances, it was reasonable for the court to conclude that a contempt sanction was still warranted. See *Local 74, United Brotherhood of Carpenters* v. *National Labor Relations Board,* 341 U.S. 707, 715; *Division 1287, Amalgamated Bus Employees* v. *Missouri,* 374 U.S. 74, 77–78.

[8] Finally, there is no merit to petitioners' assertion (Pet. 39–40) that the order of the court below unduly expands the scope of the Board's original order, as enforced by the court in 1960. Both orders only require petitioners to cease and desist from restraining and coercing employees of any employers engaged in coal mining operations within the territorial jurisdiction of District 30, United Mine Workers of America (Pet. 27a, 35a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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